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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL.

v.

CHEMEHUEVI TRIBE, ET AL.

No. 73-1667

FEDERAL POWER COMMISSION

v.

CHEMEHUEVI TRIBE, ET AL.

Brief of
The American Public Power Association
Amicus Curiae

In Support of
Petitions for Certiorari

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BRIEF OF AMERICAN PUBLIC POWER ASSOCIATION, AMICUS CURIAE

The American Public Power Association supports the petition of the Solicitor General, on behalf of the Federal Power Commission (*FPC* v. *Chemehuevi Tribe of Indians, et al.*, No. 73-1667), and that of the Utilities (*Arizona Public Service Co., et al.* v. *Chemehuevi Tribe of Indians, et al.*, No. 73-1666), for certiorari to the Court of Appeals for the District of Columbia Circuit, to review the judgment of that court in *Chemehuevi Tribe of Indians, et al.* v. *Federal Power Commission, et al.*, 489 F.2d 1207 (D.C. Cir. 1973).

APPA has received the consent of counsel for all parties to file this brief *amicus curiae*, in accordance with Rule 42 of this Court.

INTEREST OF THE AMICUS CURIAE

The American Public Power Association is composed of some 1,400 consumer-owned electric utilities in 48 States, Puerto Rico, American Samoa, the Virgin Islands and Guam. The members are municipalities, State power authorities, districts, cooperatives, and other public agencies.

The number of fossil-fuel power plants owned by publicly owned electric utilities reported to the Federal Power Commission in 1971 was 363, which constituted a total installed capacity of 21,108,410 kilowatts.[1] It is reasonable to expect that the installed capacity of such consumer-owned steam plants will quadruple by 1990.[2] In addition, a number of consumer-owned utilities have under construction, or are planning, nuclear generating plants. Publicly owned utilities also purchase electric power at wholesale from other utilities which are building or planning such nuclear facilities. All fossil-fuel generating plants use water in their boilers, and they, as well as nuclear plants, use water in their cooling operations. In many cases, such water is taken from "navigable waters" as defined in Section 3 of the Federal Power Act, 16 U.S.C. § 796(8). In others, water is taken from reaches of streams where the regimen is affected by

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[1] FPC, Statistics of Publicly Owned Electric Utilities—1971, Table 7, at XIV (1972).

[2] FPC, The 1970 National Power Survey, Table 1.2, at I-1-17 (1971).

the existence of government dams upsteam. The latter is deemed by the court below "surplus water" from a government dam, the use of which requires a license pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e). We believe that conclusion to be in error, and to be seriously prejudicial to the interests of our member utilities, for the reasons stated below. We therefore support the petition for certiorari of the Commission and the Utilities which seek a review of that determination.

ARGUMENT

We shall not repeat the arguments of the Solicitor General and the petitioning Utilities. We agree with them. We believe, however, that it is appropriate that the Court be informed of the particular stake that publicly owned utilities have in the early review by the Supreme Court of the lower court's decision.

1. The decision has already created great confusion in the planning of thermal plants by consumer-owned utilities, at a time when the industry is hard-pressed to meet its load responsibilities. There is nothing interlocutory about the decision in its effect on our members outside the Colorado River Basin. The decision, *Chemehuevi Tribe of Indians, et al.* v. *FPC, et al.*, 489 F.2d 1207 (D.C. Cir. 1973), is explicit and final in its holding that:

> ". . . the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants . . .", *(Id.* at 1242*)*.

leaving to the Commission the problem of deciding what constitutes surplus water in all cases, not just this one, and to decide to what extent its jurisdiction has been affected by congressional grants of authority

to other agencies. These issues invite litigation and delay in respects noted briefly below.

2. Serious long-range stretch-outs would be imposed upon the financing and construction of steam electric generating plants, if the decision below were to remain the law in the District of Columbia Circuit, controlling the Federal Power Commission until changed by the Supreme Court in some other case at some uncertain future date. These delays would be of several kinds. Thus:

A. Publicly owned power plants are financed, in most cases, by the issuance of revenue bonds. Where the bond issue relates to a particular thermal generating plant, the bonds cannot be sold unless and until the attorney for the public agency certifies that all necessary permits and licenses for that plant have been obtained. Bond counsel require such a certificate, and verify its accuracy. If the decision of the court below remains in force, it will be impossible to issue such a certificate with respect to any thermal power plant proposed to be located below a government dam in a reach where the regimen of the stream is affected by that dam, unless and until a proceeding of some sort in the Federal Power Commission has resulted either in the issuance of a license, or in a determination that no license is required.

B. Proceedings in the Commission which result in a decision that no license is required, assuming that such a proceeding is available in a "surplus water" case under Section 23 of the Federal Power Act, 16 U.S.C. § 816[3] (and this is not clear), would be subject to ap-

[3] FPC v. Union Electric Co., 381 U.S. 90 (1965), cited extensively below and in the petitions here, arose under Section 23.

peal by the project's opponents. A delay of at least a year in the Commission, and another one to two years in the court of appeals, could be anticipated. Such delays, added to the lead time required normally for planning, manufacture of equipment, and construction, would seriously hinder the efforts of publicly owned utilities to provide adequate supplies of electricity to their consumers.

C. Moreover, the opinion implies that use of cooling water by nuclear plants as well as fossil-fuel power plants is subject to licensing by the Federal Power Commission [4] in addition to the licensing requirements of the Atomic Energy Act. If so, the lead time for licensing and constructing atomic plants, already relatively long (nine years on the average) would be increased by several years.

3. The problem created by the opinion below is national in scope because federal dams (notably flood control dams) have been constructed or authorized for construction in all important river basins in the country for the very purpose of affecting the regimen of the river. For example, rivers such as the Missouri and Mississippi would be involved because of upstream flood control dams, although, absent such dams, the navigable character of these rivers would confer no licensing jurisdiction over steam plants, as the court of appeals held (pp. 1234-35). The opinion makes no distinction between navigable and nonnavigable streams, in its "surplus water" rationale. Steam

[4] "At a minimum, Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricity is ultimately produced." *Id.* at 1242. See also p. 1214, n. 20, referring to nuclear plants.

plants using waters of nonnavigable streams in semi-deserts below reclamation dams, *e.g.*, Salt River in Arizona, would apparently require licenses. It is difficult to believe that Congress intended to subject such uses of water by steam plants to licensing, while deliberately excluding (as the court properly held) steam plants using waters of navigable streams not affected by upstream government dams. Some difficult and contentious classifications of rivers would be required by this curious dichotomy.

4. The decision imposes great administrative difficulties. The Federal Power Act, not having been written with steam plants in mind, would not be an adequate vehicle for the processing of steam plant license applications or administration of such licenses after issuance. To name only a few problems suggested by the Act's provisions relating to hydro projects: What would constitute the "project" and "project works," under Section 3, 16 U.S.C. § 796 (11), (12)—the water diversion facilities or the whole generating plant? The power plant may be several miles from the stream. The Act's definitions of "project" and "project works" are wholly foreign to the components of a steam plant. Would the preference right of public agencies under Section 7 (16 U.S.C. § 800) apply? Would the preliminary permit provisions of Section 4(e) (16 U.S.C. § 797(e)) and Section 5 (16 U.S.C. § 798) be applicable? What would be the duration of such a license? The Act specifies a period not exceeding 50 years (Sec. 6, 16 U.S.C. § 799), and this is the usual term related to the long life of hydro projects. But the normal life of a thermal plant is of the order of 30 to 35 years. Would the plant be subject to recapture by the United States, as a

hydro project is, at the end of the license period (Sec. 14, 16 U.S.C. § 807)? Could the licensee exercise the powers of eminent domain granted by the Act to licensees of hydroelectric projects (Sec. 21, 16 U.S.C. § 814)?[5] It is impossible to fit the specifications and operations of a steam electric generating plant into the Procrustean bed of a statute designed only for hydroelectric projects. Any commission charged with the responsibility for licensing steam plants would need an entirely different set of statutory criteria and guidelines.

5. Pending before Congress are several bills which would delegate to a federal agency (but not, in all bills, to the Federal Power Commission) authority with respect to the siting and licensing of thermal power plants.[6] All such legislative proposals recognize that the licensing of thermal power plants demands statutory criteria far different from those imposed on hydroelectric facilities under the Federal Power Act, although there are differing approaches as to whether primary responsibility in this field should rest with the States (as at present) or should be newly lodged in the Federal Government, and, if so, in what agency. The court below noted in dismissing respondents' arguments that thermal electric plants are "project works" under Section 4(e) and that such arguments would be better made to Congress.[7] That same rationale would seem to apply here where, in

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[5] See Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958), illustrating the broad reach of this power.

[6] *E.g.*, H.R. 13484, H.R. 13204, 93d Cong., 2d Sess. (1974); S. 935, H.R. 180, 93d Cong., 1st Sess. (1973).

[7] 489 F.2d at 1235.

effect, the court below has subjected thermal power plants to Federal Power Commission regulation, while the Congress is in the process of deciding whether to subject any such facilities to federal regulation. Congress apparently does not believe the question was decided 54 years ago under the "surplus water" provisions of Section 4(e).

CONCLUSION

For these reasons, we ask that the petitions for certiorari of the Federal Power Commission and the Utilities be granted.

Respectfully submitted,

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